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CHILDREN'S LAW PROJECT

Children's Law Report

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Special Education: You Can Use the System to Get Services for Qualified Abused and Neglected Children

Part I of a 2-part series

What is Special Education? Where children with disabilities are placed in a special classroom or school? If you think of special education in that way, you are both right and wrong. That is not what the law calls for but it is the way the system is sometimes used.

The United States Congress recently reauthorized the *Individuals with Disabilities Education Act* (IDEA) with *Amendments of 1997, P.L. 105-17*. This article explains the law's requirements for children with disabilities, highlighting some of the changes.[1] IDEA, which applies to students from birth to twenty-one, requires that children with disabilities be provided with a "free appropriate public education" (FAPE) in the "least restrictive environment" (LRE) that meets the students' unique needs and prepares them for employment and independent living. Under IDEA, "child with disability" means a child with mental retardation; hearing, speech or language, visual, or orthopedic impairment; serious emotional disturbance; autism; traumatic brain injury; other health impairment; or specific learning disabilities. IDEA places an affirmative duty on local educational authorities (LEAs) to identify students who need special education and related services.

A "free appropriate public education" means an individually designed special education program and related services. Related services are supportive services such as transportation, occupational and physical therapy, counseling, parent training, recreation, social work services, speech and language therapy, and school health services (a new related service is orientation and mobility services) that assist the student in benefiting from special education services.

The special education process is begun when anyone with an interest in the child requests that the school assess the child to determine if the child has a disability. This request can come from the parents, a teacher, the child's social worker or guardian *ad litem*. It is essential to make this request in writing. State Department of Education policies allow 45 days to complete the evaluation from the date of the request. Persons seeking an evaluation should not agree to defer it until completion of any type of informal process that the school might offer. The parents must be notified that the school wants to assess the child and what type of assessment will be done. The parents must agree to the assessment and to each of the tests which are to be included in the assessment. Generally, biological parents of children in foster care retain the ability to consent to the child's educational plan unless the court specifically denies the parents' educational rights.

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[1] Some children with disabilities receive services through Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, rather than through the IDEA. These children generally fall into two categories: (1) they have a physical disability such as diabetes which does not affect their ability to learn but may require modifications such as extra snacks or (2) they have attention deficit disorder which does not reach the level of severity of the IDEA but does require curriculum or classroom modifications. The procedures for implementing the acts are essentially identical, although some terminology and aspects of the discipline process are different.

For students whose parents are unknown or unavailable, whether or not the child is in foster care, the school must appoint a surrogate parent, a person who will act as the parent in educational matters regarding the student. This cannot be a school or DSS employee. A guardian *ad litem*, an adult relative of the child, or a foster parent can be appointed as the surrogate parent for special education purposes if they are knowledgeable about the child and the child's rights. The child can be reevaluated if a member of the team requests it and must be reevaluated at least every three years. The parent or surrogate parent must agree to the tests which will be included in the reevaluation. Parents, guardians, or surrogate parents have the right to obtain independent evaluations at their own expense and have the right to seek an independent evaluation of the student at public expense. They will be reimbursed if the independent evaluation provides additional or different information than the original evaluation and that information is accepted in any forum (by the school district, in mediation or by any hearing officer).

You should also be aware that IDEA requires that the State develop and implement a statewide, comprehensive system of early intervention services for infants and toddlers with disabilities and their families. South Carolina's early intervention program, called BabyNet, is administered by the Department of Health and Environmental Control. Each family of such an infant or toddler should have an Individualized Family Service Plan which is reviewed at least annually. IDEA also requires that school districts make a free appropriate public education available to children with disabilities aged 3 through 5. BabyNet must start planning for the transition into public school at least six months before the child's third birthday.

The blueprint for the student's special education is the Individualized Education Program (IEP). The key word here is individualized. The IEP is put together by the IEP team, which includes the parents or surrogate parent of a child with a disability (their rights are transferred to a competent child who turns 18), a regular education teacher (a new requirement effective July 1, 1998), a special education teacher, a representative of the local education agency who has authority to agree to services, an individual who can interpret the evaluation results, and other people requested by the parents or agency.

The IEP should start with a review of the child's present levels of educational performance including the child's strengths and areas of improvement and parents' areas of concern. Next, the team is supposed to set up both short-term and long-term goals. An advocate for the child who knows the child well can play a critical role in helping the parent or surrogate parent identify the child's strengths and areas of improvement and in setting realistic goals that may not be apparent to the school personnel.

Based upon those goals and objectives, the team identifies what special education and related services the child needs. The IEP must be very specific about the related services to be provided, the number of hours per week the student is to receive each service, a description of any regular education services the student will receive, when the services will start and end, and the ways that the child's educational progress will be evaluated. Finally, the team identifies an appropriate placement.

The IEP must also include any assistive technology services and devices that the students needs and must note whether the student needs extended school year services (services provided during the summer to students who need these services in order to continue to make educational progress during the school year). The IEP should also indicate whether the child needs any modifications to the regular discipline code and whether the child participates in regular standardized testing.

Under the 1997 law, states must develop interagency agreements and reimbursement programs to ensure that education agencies can access funding from noneducational agencies responsible for providing services (such as Medicaid) that are also necessary to ensure a free appropriate public education. Parents are not required to pay for services provided under the IEP (the Free in FAPE).

Starting when the child is 14 and updated annually, the IEP must include a statement of transition service needs of the child. Starting no later then 16, earlier if deemed appropriate by the IEP team, the IEP must include transition services for the child including, when appropriate, a statement of interagency responsibilities or any linkages with other agencies, for example, Vocational Rehabilitation or the Department of Disabilities and Special Needs. Transition can include both work and life skills. Starting at least when the child is 17, the child must be informed of his or her educational rights which will transfer to the child upon reaching age of majority.

The 1997 law continues the mandate that children with disabilities must, to the maximum extent appropriate, be educated with nondisabled children. IDEA presumes that students with disabilities will be educated in their neighborhood schools unless their IEP requires some other arrangements. Special classes, a separate school, or removal

of children with disabilities from the regular educational environment is to occur only when the nature or severity of the child's disability is such that the student's needs cannot be met satisfactorily in regular classes even with supplementary aids and services. Children with disabilities must be educated in the least restrictive environment.

The parents, guardian and/or surrogate parent are key players in the special education process. They have the right to examine all records relating to their child. Parents or the surrogate parent must be notified in advance of meetings and must be given the opportunity to participate in the development of the IEP. They can agree or disagree with each item separately. This includes what the child's goals and objectives should be, what services should be provided and the child's placement. They can agree with the goals and objectives and with the services that the school has proposed, but object because there are additional services that the parents feel are needed for the child to benefit from school that the school didn't write down. They can agree with the services but object to placement. The parents or surrogate parents have a great deal of control over the process.

Part II, to appear next month, will discuss methods by which parents or the agency can challenge any aspect of special education.

Recent South Carolina Case

State v. Evette Pierce, Opinion No. 24613, Heard Oct 31, 1995 - Filed May 12, 1997

(The State filed a Petition for Rehearing. The Petition for Rehearing was denied on June 17, 1997. The Order for Remittitur was issued and case sent back to the trial court.)

Ms. Pierce was convicted of homicide by child abuse for the death of her two-year-old son. The Supreme Court in a 3-2 split opinion[2] reversed the conviction and remanded the case.

The sole issue on appeal was whether the trial court erred in admitting testimony regarding prior injuries to and Ms. Pierce's treatment of the child. At trial, two hospital employees testified that one year prior to his death the child had been treated for a "split lip" and swollen eye.

The majority holds that this testimony was improperly admitted under State v. Lyle[3], to prove a common scheme or plan. That opinion is based on the court's belief that there was no "conviction or clear and convincing proof that [Ms. Pierce] inflicted the injuries"[4] nor was the "prior act toward [the child] of such close similarity to homicide by child abuse so as to overrule its prejudicial effect."[5] However, the majority opinion goes on to add that, whether the evidence of the prior acts of abuse "would have been admissible to establish the battered child syndrome is not before us."

The dissent argues that the evidence of prior acts of abuse was properly admitted as a common scheme or plan under State v. Lyle. The dissent would extend the logic of State v. Whitener[6] and State v. McClellan[7], both sexual abuse cases, where testimony regarding sexual abuse "by the same perpetrator against the same victim [was held admissible] because it showed '*continued illicit intercourse*'"[8] to child physical abuse cases. The dissent contends that Whitener and McClellan apply not only to sexual abuse but also child physical abuse cases stating that "[c]ontinued illicit intercourse is analogous to a pattern of child abuse . . . ."

At trial Ms. Pierce testified that her son was accident prone and his fatal injury was the result of his bumping his head on a table. The dissent contends that, in light of the defense's claim that the child died as a result of an accident, the evidence of the prior injuries would have been admissible to negate the defense of mistake or accident under Lyle. The dissent also argues that the evidence of the child's prior abuse was properly introduced and admitted "to show that [the child] was the victim of the battered child syndrome and his death was caused not by accident, but by the intentional acts of child abuse."

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[2]Justice Moore authored the majority opinion with Chief Justice Finney and Justice Waller concurring. Justices Burnett and Toal dissented in a separate opinion.

[3]State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923)

[4]The Court cites State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989).

[5]The test set out in State v. Parker, 315 S.C. 230,233, 433 S.E.2d 831,832 (1993), to determine if the probative value outweighs the prejudicial effect is whether "the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to 'overrule the prejudicial effect' . . . ." If so, the evidence of the prior act is admissible.

[6]State v. Whitener, 228 S.C. 244, 89 S.E.2d 701(1955).

[7]State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984).

[8]*Citing* McClellan, at 392, 774 (emphasis added).

Estelle v. McGuire, An Under Utilized Resource[9]

In State v. Evette Pierce, Opinion No. 24613, heard Oct 31, 1995 - filed May 12, 1997, the South Carolina Supreme Court reversed the conviction of a mother for homicide by child abuse for the death of her son. The reversal was based on the Court's decision that the trial court had improperly allowed in evidence as to prior injuries to the child. The Court held that the evidence was not properly admitted under State v. Lyle, but did hint that a possible way to get the evidence in might have been to argue Battered Child Syndrome. Following is an outstanding article published in Update by the American Prosecutors Research Institutes's National Center for Prosecution of Child Abuse that lays out how to argue Battered Child Syndrome.

A six month old girl arrives at the hospital bluish in color and not breathing. The doctor notices bruises around the infant's ears and a large and recent bruise on her chest surrounded by other multiple bruises. The girl dies 45 minutes later.

An autopsy reveals numerous contusions to the child's chest and abdominal area. Injuries include a split liver, split pancreas, lacerated large intestine, damage to a lung, and damage to her heart. While these injuries are relatively recent, medical personnel also find rectal tearing approximately six weeks old and rib fractures approximately seven weeks old. Physicians diagnose the child as a victim of Battered Child Syndrome.[10]

The child's mother and father brought the baby to the hospital. The father tells police he was home with the child when the recent injuries occurred and believes the child fell from a couch. There is no direct evidence that the rectal tearing and rib fractures occurred in the father's exclusive care although this remains a possibility.

The father is charged with the murder of the child. At trial, the Court allows prosecutors to admit medical evidence that the child's injuries, including the rectal and rib injuries, are the product of Battered Child Syndrome. The evidence is admitted to show the child's death was not an accident and that the father is the perpetrator. A jury convicts the father of the infant's murder.

This was the fact pattern facing the United States Supreme Court in the case of Estelle v. McGuire.[11] The case presented the justices with a legal quagmire often found in cases of child abuse.

In order to prove an intentional injury and to establish the identity of a perpetrator, prosecutors routinely seek to admit all evidence of trauma to the child's body. Often-times, prosecutors seek admission of older injuries as a prior bad act under the rules of evidence.[12] To admit a prior bad act, however, there must be evidence from which jury can conclude that the prior act occurred and the accused is responsible.[13]

In a case of multiple caretakers, it may be difficult to establish that older injuries are the result of conduct from a particular suspect. If so, the evidence of prior injuries may be inadmissible on the issue of identity.[14]

In Estelle, defense counsel contended there was insufficient evidence to admit testimony concerning the rectal and rib injuries as prior bad acts. In addition, the defendant did not contest the child's injuries were intentional. Accordingly, defense counsel argued the evidence of prior injuries was irrelevant on the issue of whether the trauma was intentional. In rejecting these arguments, the Supreme Court issued a landmark ruling of benefit to prosecutors everywhere.

Battered child syndrome is admissible to show a child's injuries are not accidental

The Supreme Court noted that in cases of child abuse, a prosecutor must first prove that injuries are the result of intentional trauma. To the extent evidence of Battered Child Syndrome demonstrates intentional trauma, it is relevant and

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[9] *Update* (APRI National Center for Prosecution of Child Abuse.) v.10, n.4/5, 1997.

[10] The battered-child syndrome is a term used by physicians "to characterize a clinical condition in young children who have received serious physical abuse." C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller, and Henry K. Silver, *The Battered Child Syndrome*, 181 JAMA 17 (July 7, 1962).

[11] 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed 2d 385 (1991).

[12] Evidence of other crimes, wrongs, or acts is not admissible to show propensity to commit a certain offense but may be admissible for other purposes including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Federal Rules of Evidence 404(b).

[13] Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496 (1988).

[14] Id.

admissible even if the evidence does not establish the identity of the perpetrator.[15]

The defendant's apparent concession at trial that the child's death was not an accident was insufficient to exclude this evidence. The Court observed that "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."[16]

Insofar as all eight justices ruling on this issue agree on this point,[17] Estelle is a powerful precedent for the proposition that a child's prior injuries are relevant even if they do not conclusively establish the identity of the abuser.[18]

Battered Child Syndrome May be Admissible to Establish Identity

Estelle also contains helpful language of use to prosecutors seeking to admit evidence of prior injuries as a means of proving the identity of the perpetrator.

All eight justices agreed there was sufficient evidence upon which a jury could find that the father committed the prior rib and rectal injuries.[19] Accordingly, a jury could use these prior injuries to establish the identity of the father as the person responsible for the child's murder. [20]

In reaching this conclusion, the Court noted that the mere diagnosis of Battered Child Syndrome limits the suspects to the child's immediate caretakers. The Court found that "(o)nly someone regularly 'caring' for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries through several months."[21]

As further evidence that the father was responsible for the prior injuries, the Court cited the testimony of a neighbor who witnessed the father treat the child roughly on two occasions. The Court also cited evidence that at the hospital the mother pressed the father to reveal the true nature of the child's injuries.[22] At trial, the mother testified that she was responsible for the child's murder.[23]

Since the evidence of the father roughly treating the child did not directly relate to the rectal and rib injuries, and the mother's statements at the hospital likewise did not directly address the older injuries, it is apparent that the diagnosis of Battered Child Syndrome was the primary basis upon which the Court found the prior injuries to be relevant on the issue of identity.

If this is true, prosecutors dealing with cases containing this diagnosis cannot only admit the evidence to show an intentional trauma, the evidence may be admissible to prove identity even in the absence of direct evidence connecting the accused to the prior injuries. If it can be affirmatively shown that the accused was not present when prior injuries were inflicted, the evidence likely remains relevant as exculpatory evidence.

Although all eight justices agreed there was sufficient evidence upon which a jury could find the father responsible for the prior injuries and to use this as a factor in determining his guilt for the murder, Justices O'Connor and Stevens dissented from the majority opinion on the basis the trial court's jury instructions were so poorly written that the jury may have believed the court already determined the father to have inflicted the prior injuries.

Although the majority opinion disagrees with the dissenters' reading of the jury instructions, prosecutors should exercise care to avoid instructions which invade the province of the trier of fact. Jury instructions which unambiguously leave to the jury the decision of determining the perpetrator of the prior injuries and the causal connection of those injuries to the present circumstances will likely withstand any claimed violation of the due process clause.

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[15] 112 S.Ct. 480.

[16] 112 S.Ct. 481.

[17] Justice Thomas did not participate in the decision. Justices O'Connor and Stevens joined the court's holding that battered child syndrome is relevant to establish intentional trauma. However, O'Connor and Stevens dissented from the court's ruling that the trial court's jury instructions did not violate due process.

[18] For additional discussion on the importance of Estelle, see Darin Michael Colussi, Comment, *Evidence- Estelle v. McGuire*, 112 S.Ct. 474 (1991), 26 Suffolk U.L. Rev. 1213 (1992); Tammara K. Poage, Comment, *Constitutional Law: Battered Child Syndrome: Balancing an Accused's Right to Due Process with the Evidentiary Problems Inherent in Child Abuse Cases*, 32 Washburn L.J. 118 (1992).

[19] 112 S.Ct. 483, 486.

[20] 112 S.Ct. 483.

[21] 112 S.Ct. 483 *citing* People v. Jackson, 18 Cal.App.3d at 507, 95 Cal. Rptr. at 921.

[22] 112 S.Ct. 483.

[23] 112 S.Ct. 479.

Adoption Promotion Act of 1997

The United States Congress is considering Senate Bill 827 and House Bill 867 which would amend the reasonable efforts provision and grant incentives to states to promote adoption. HR 867 has passed the House of Representatives and was read for the second time in Senate. Senate 827 is the corresponding "Adoption Promotion Act of 1997" for the Senate.

HR 867 would amend 42 U.S.C. 671 (a)(15) to identify situations in which reasonable efforts would not required. The amendment provides that reasonable efforts are not necessary if (1) reasonable efforts are inconsistent with the permanent plan for the child; (2) the child has been subjected to aggravated circumstances of abuse; or (3) the parent's parental rights to a sibling have been terminated involuntarily. In determining reasonable efforts the child's health and safety shall be of paramount concern. Efforts must be made to place the child for adoption or in a permanent home if the circumstances fit one of the three above referenced exceptions to reasonable efforts requirement.

The bill would amend 42 U.S.C. 675(5) so that a termination of parental rights action can be filed for a child under the age of 10 years if the child has been in foster care for 18 out of the last 24 months. A termination of parental rights action is not required if:

- the child is in relative placement;
- state court or agency has held it is not in the best interest of the minor child to terminate the parents' rights; or
- the state has not provided to the family appropriate services when reasonable efforts are required to be made.

This amendment would be applicable to children who enter foster care on or about October 1, 1997.

The states may receive grants as an incentive to increase the number adoptions of children from foster care and of special needs children.

The bill would amend 42 U.S.C. 675(5)(c) by providing that a permanency planning hearing must be held within 12 months of the child entering foster care, as opposed to 18 months. A permanent plan must be developed for the child which includes decisions on whether the child can be returned to the parent, whether the agency should file a petition to terminate parental rights and pursue adoption, whether legal guardianship or other permanent living arrangements, including relative placement, can be established for the child.

Foster parents or any relatives providing care for the child are entitled to notice of the permanency planning hearing and must be given an opportunity to be heard. However, foster parents or the relatives are not considered parties to the action.

Under this bill, the state agency must develop a plan and specific steps to be taken to find an adoptive family or other permanent living arrangement for the child. Permanent living arrangements can include an adoptive family, a legal guardian, or relative placement. Documentation of an adoption or legal guardianship shall include the use of child specific recruitment efforts.

If this bill is adopted, an advisory panel must be developed to review and make recommendations on kinship care. The Secretary of Health and Human Services would have until March 1, 1998 to convene the panel. The panel would have to submit a report to the House Ways and Means Committee and the Senate Finance Committee by November 1, 1998. The report would include the following information:

- states policies regarding kinship care
- characteristics of the kinship providers (race, age, etc.)
- number of persons in the household
- the parent's access to the child while in kinship care
- a source of funds for kinship care
- permanency planning goals for the child
- services provided to the parent
- services provided to the kinship provider
- circumstances or conditions that resulted in kinship placement.

The states will be required to develop laws and procedures that would allow a critically ill parent to designate a standby guardian for the minor child. The parent would not lose their parental rights. The standby guardian's duty would take effect upon:

- the death of the parent;
- mental incapacity of the parent;
- physical incapacity of the parent with the parent's consent.

Case Decisions From Around The Nation

Admission of Expert Medical Testimony

The Defendant in Commonwealth of Pennsylvania v. Johnson, 690 A. 2d 274 (Pa. Super. 1997), was charged with involuntary deviant sexual intercourse, attempted involuntary deviant sexual intercourse, aggravated indecent assault, indecent exposure and corruption of minors. The defendant attempted to exclude the doctor's testimony. The doctor would have testified that absence of evidence of physical trauma was not inconsistent with allegations of sexual assault.

The lower court granted the defendant's motion *in limine* to exclude the evidence. The Superior Court for Pennsylvania ruled that the doctor's testimony is admissible as evidence and therefore reversed the lower court's decision.

The defendant argued that the doctor's testimony would improperly bolster the child's credibility and the testimony of the presence or absence of physical evidence is inadmissible in child sexual abuse cases.

The Pennsylvania courts have previously made a distinction between expert testimony regarding physical facts and testimony regarding the behavior of victims. An expert witness' testimony regarding the physical condition of the child does not bolster the child's creditability and is useful information for the jury. However, an expert witness' testimony of whether a child's conduct or behavior is consistent with sexual abuse is assuming the jury's role in evaluating the witness. The court upheld the admissibility of the pediatrician's testimony that the absence of physical injuries or scars is common and does not exclude sexual abuse.

Child Requests Domestic Violence Protection Order Against Father

In Beermann v. Beermann, 559 N.W. 2d 868 (S.D. 1997), the minor child requested a temporary protection order restraining her father from abusing her during visitations. The 14-year-old child argued with her father during a visitation. The defendant picked his daughter up, dropped her, picked her again and threw her in a chair. The defendant was verbally abusive toward his daughter.

The trial court denied the protection order. The lower court held that the domestic violence statute did not apply to children, only adults. The petitioner requested a Writ of Mandamus from the South Dakota Supreme Court. The state supreme court granted an alternative Writ of Mandamus, ordering the lower court to issue a temporary restraining order and to conduct a hearing on the entire matter. After the hearing the lower court again ruled that the domestic violence statute did not apply to children. The court ruled the petitioner could not maintain the action due to her age. The court ruled that the petitioner had other options such as the mother requesting a modification in the visitation schedule and protection under the "Protection of Children from Abuse or Neglect" act. The court also ruled that evidence was not sufficient to establish the abuse.

The South Dakota domestic violence statute provides that " a petition may be made by any family or household member against any other family or household member." The supreme court held that the statute is not limited to adult family or household members. Additionally, the term family or household member is clearly defined as "spouses, former spouses or persons related by consanguinity, adoption or law, persons living in the same household, persons who have children."

The supreme court ruled that the trial court had the option of appointing a guardian *ad litem* to protect the interest of the minor child as opposed to dismissing her action. The supreme court ruled that a custodial parent may choose not to pursue a modification of visitation action or may be unable to afford the cost of a modification of a visitation action. Under the domestic violence provisions, a victim can complete the preprinted forms without the assistance of counsel and the relief requested may be granted sooner. The supreme court noted that the petitioner was not requesting a modification of the visitation only that the defendant is restrained and enjoined from abusing her during the visitation.

Note:

Advocates should note that the South Carolina statute on **Protection from Domestic Abuse** defines "household member" as a spouse, former spouse, parents or children, and other persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly were cohabiting (§20-4-20). Any household member in need of protection or any household member on behalf of the children may file the petition for protection against abuse (§20-4-40). Therefore a child who is abused by a household member is entitled to protection under the "Protection from Domestic Abuse Act".

Position Announcement

The Children's Law Project is seeking a Resource Attorney to provide technical assistance, conduct training, and prepare legal resource materials primarily related to criminal child abuse cases. This grant-funded position is full-time and includes state benefits. Requirements are: law degree; membership in S.C. Bar; and a minimum of three-years' experience in criminal child abuse cases. Experience in family court child protection cases would be a plus. Columbia residents apply through the USC Employment Office, 508 Assembly St., 9-11AM or 1-3 PM Mon. - Thurs. Others may send resumes to the Children's Law Project.

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